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Nos. 85-1239, 85-1406

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In The

Supreme Court of the United States

October Term, 1985

ARCO ALASKA, INC.; AMOCO PRODUCTION COMPANY; et al.,

Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL; et al.,

Respondents.

DONALD P. HODEL, Secretary of the Interior; and UNITED STATES DEPARTMENT OF THE INTERIOR,

Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL; et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[redacted] **BRIEF OF RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC. AND THE ALASKA SUPPORT INDUSTRY ALLIANCE IN SUPPORT OF PETITIONERS, SECRETARY OF THE INTERIOR, ET AL.**

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., AND THE ALASKA SUPPORT INDUSTRY ALLIANCE IN SUPPORT OF PETITIONERS, SECRETARY OF THE INTERIOR, ET AL.

This motion of Resource Development Council for Alaska, Inc. (RDC), and Alaska Support Industry Alliance (ASIA) to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule No. 36. All parties have given their oral consent to this amicus

curiae brief. However, due to the insufficient time to physically procure the parties' individual written consents and still comply with the parties' intended briefing schedule, the applicants herein have not been able to lodge the parties' consents with the Clerk of the Court, and proceed instead by way of motion for leave to file the annexed amicus brief. As soon as the parties' written consents have been obtained, applicants, Resource Development Council for Alaska, Inc., and Alaska Support Industry Alliance, will lodge them with the Clerk of this Court.

Resource Development Council for Alaska, Inc., is a nonprofit corporation composed of some 10,000 members. Membership includes people in government, education, business (both management and labor), and many from various other segments of the private sector. RDC is dedicated to creating a broad-based, diversified, and stable economy for Alaska. It advocates developing Alaska's resources in an orderly manner, creating long-term, stable employment improving living standards, and reducing living costs for Alaskans. RDC supports reasonable and necessary environmental protection of Alaska's priceless fish, waterfowl, and marine mammal resources.

Alaska Support Industry Alliance is an association of some 200 employers doing business in Alaska. Membership provides equipment, supplies, and services to the state's oil, gas, and mining industries. The membership is extremely broad, representing engineering companies and constructors, architects, attorneys, oil well loggers,

and drilling firms. Also included are caterers, transportation companies, equipment vendors, and diving firms. ASIA has union and nonunion employers, with all sizes of employers represented. The unifying focus of ASIA is an awareness of the critical role of the state's oil and gas industry for the social and economic fabric of Alaska. ASIA fully supports reasonable environmental regulation of petroleum resource development activities.

The issues posed by the petitions for writ of certiorari in this case are of national significance, exceeding even the interests of parties from Alaska where this controversy originated. The proper role of federal courts in enforcing environmental statutes, the proper interpretation of those statutes, and the correct judicial construction of congressional intent in the enactment of such statutes are issues that reach beyond the confines of the State of Alaska. Nevertheless, amici are directly affected by such questions in a particularly direct manner. Their experience with the results of the statutory construction and interpretation that necessitate the petition in this case forms a unique public interest perspective that is well-suited to providing the Court with additional argument. Amici, Resource Development Council for Alaska, Inc., and the Alaska Support Industry Alliance, have concluded that, because of the national significance of these issues, the present parties cannot adequately represent the interest of the broader public while at the same time representing their own particularized positions.

For the foregoing reasons, Resource Development Council for Alaska, Inc., and the Alaska Support Industry Alliance request that this motion to file the annexed brief amicus curiae be granted.

DATED: March 4, 1986.

Respectfully submitted,

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INTEREST OF AMICI

As initially set out in Resource Development Council for Alaska, Inc. (RDC), and Alaska Support Industry Alliance's (ASIA) preceding motion for leave to file this brief, RDC and ASIA are organizations which represent a broad spectrum of the public vitally interested in the fair and accurate interpretation of the environmental and conservation statutes that guide the exploration for and development of Alaska's vast offshore petroleum energy resources. RDC and ASIA represent individuals and organizations, both private and governmental, whose economic survival will be, and is now being, severely and negatively impacted by erroneous legal rules and statutory constructions emanating from the United States Court of Appeals for the Ninth Circuit's decision in this and related cases.

The Ninth Circuit's announced rule of a *per se* requirement of injunctive relief upon a *prima facie* showing of violation of an environmental or conservation statute has operated to unreasonably restrict the opportunities of RDC and ASIA's members to pursue their livelihoods and count upon stable sources of income. By unnecessarily shutting down the enormously expensive process of outer continental shelf (OCS) development and rendering that process even more uncertain, this unprecedented departure from traditional equity principles has cost untold amounts in lost employment and economic opportunity for Alaskans and other Americans.

The Ninth Circuit's construction of Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120, has the capacity for producing the same negative effects on the Alaska and national economies. By requiring the Secretary of the Interior to

attempt to evaluate effects of OCS exploration and development or production at a time in the leasing process when such effects are uncertain and speculative at best, the Ninth Circuit's decision in this case casts a completely unnecessary cloud on the legitimate pursuit of environmentally sensitive OCS development activities. The result is the unwarranted waste of time and pointless duplication of regulatory processes.

Finally, the Ninth Circuit's decision in this case has ignored legislative history and thereby subverted congressional intent regarding expeditious OCS inventorying and development. RDC and ASIA represent individuals and organizations engaged in such inventorying and development who have been deprived of the ability to do so efficiently and economically. The Ninth Circuit has attempted to redefine the public and national interest in a manner unintended by Congress and clearly harmful to amici's interest in their members' ability to pursue their livelihood. Amici in this case are in the position of representing all parties who ask that the courts respect the policy choices of our national representatives.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 774 F.2d 1414 (9th Cir. 1985).

STATEMENT OF THE CASE

Amici adopt petitioners' statements of the case as set out in their petitions for writ of certiorari.

SUMMARY OF ARGUMENT

1. Amici adopt and incorporate herein by reference petitioners' arguments on the ability of trial courts to exercise equitable discretion in granting injunctive relief as articulated by this Court in *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982).

2. Amici adopt and incorporate herein by reference petitioners' arguments on the proper construction of Section 810 of ANILCA, 16 U.S.C. § 3120, within the context of the tiered decision-making process of the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1331, *et seq.,* as prescribed by this Court in *Secretary of the Interior v. California,* 464 U.S. 312 (1984).

3. The Ninth Circuit's pronouncement that Congress decided in ANILCA to prefer the protection of subsistence resource use over environmentally sound, expeditious OCS energy development is without foundation in legislative history and contrary to expressed congressional intent.

ARGUMENT

LEGISLATIVE HISTORY CLEARLY ESTABLISHES THAT CONGRESS HAS NOT CHOSEN TO PREFER SUBSISTENCE USE INTERESTS OVER REASONABLE OCS DEVELOPMENT

In reaching its decision in *People of the Village of Gambell v. Hodel*, 774 F.2d 1414, the Ninth Circuit appears to engage in the traditional analysis of the propriety of granting or withholding injunctive relief.[1] In so doing, the court passes on its assessment of the competing public interests then before the court. *Id.* at 1425-26. In a section of its public interest analysis dealing with this Court's decision in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, the Ninth Circuit reaches the wholly unexpected conclusion that "[i]t appears to us that in enacting section 810, Congress has chosen the protection of subsistence life over oil exploration."[2] Having reached this conclusion in order to bolster its *per se* injunction rule by appealing to this Court's decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Ninth Circuit repeats this assertion and even amplifies it in its conclusion:

> "The public interest as expressed by Congress in the 1980 amendments to the Conservation Act [*i.e.*, ANILCA] requires that the uses and needs of the Alaskan Natives, and our national concern over survival of their culture, must *prevail over our possible energy needs*. Thus, the denial of a preliminary injunction was error because the court misapplied the

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[1] *See People of the Village of Gambell v. Hodel*, 774 F.2d at 1419-28, for the court's treatment of the usual factors of: (1) probable success on the merits; (2) balance of harms; and (3) public interest.

[2] *Id.* at 1426 n.2.

> law of the circuit concerning the 'unusual circumstances' exception and failed to honor *the announced policy of Congress favoring the rights of Alaskan Natives over this nation's need to exploit the potential oil resources under the waters of the outer continental shelf off the shores of Alaska.*" *People of the Village of Gambell v. Hodel,* 774 F.2d at 1428 (emphasis added).

The assertion of a congressional preference for subsistence use preservation is thus central to the court's decision. Such an assertion is ungrounded in legislative history, and is, in fact, directly contrary to expressed congressional intent.

Senate Report No. 413, 96th Cong., 2nd Sess. 5, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, sets out the text with commentary of the legislation that eventually became ANILCA. In discussing the amendments made by the Senate Committee on Energy and Natural Resources to the text of the House of Representatives' bill, H.R. 39, the report notes:

> "The second amendment [to Section 810] clarifies that the requirements of Section 810 are '*procedural*' in that until the requirements of the section have been satisfied the proposed action may not proceed, but once the requirements of the section are satisfied and incorporated into existing land use planning processes *the proposed action may proceed even though its effect may be adverse to subsistence uses.*" *Id.* at 5178 (emphasis added).

The Ninth Circuit's decision in *People of the Village of Gambell v. Hodel, supra,* is utterly and inexplicably silent on this language. The court, quoting itself in *People of the Village of Gambell v. Clark,* 746 F.2d 572 (9th Cir. 1984), noted that Section 810(a) was enacted " 'to benefit

the Natives,' and to be 'consistent with the Congressional policy established by section 802(1) that the management of the public lands shall cause the least adverse impact possible on rural residents who depend upon subsistence uses.' " *People of the Village of Gambell v. Hodel,* 774 F.2d at 1425, citing *People of the Village of Gambell v. Clark,* 746 F.2d at 581, *quoting,* 126 Cong. Rec. 29,279 (1980). Consistency and benefit do not amount to a substantive preference in the face of congressional language unavoidably establishing the *procedural* character of the section.

Congress established a procedural requirement that subsistence uses be integrated into the decision-making processes of federal land managers in Alaska. Congress foresaw that even after taking subsistence uses into consideration, there would be occasions when subsistence uses could be adversely affected.[3]. There is no support whatsoever for the position of the Ninth Circuit that Congress intended by Section 810 to create a substantive preference for the protection of subsistence uses over the environmentally sensitive provision of this country's vital energy needs.

CONCLUSION

In reaching its decision in *People of the Village of Gambell v. Hodel, supra,* interpreting the relationship between the requirements of Section 810(a) of ANILCA, 16 U.S.C. § 3120(a), and the Outer Continental Shelf Lands

[3] 1980 U.S. Code Cong. & Ad. News 5178.

Act Amendments of 1978, and announcing its *per se* rule of mandatory injunctive relief for a *prima facie* violation of an environmental or conservation statute, the Ninth Circuit relied on a mistaken assessment of national policy concerning Alaskan subsistence uses as indicated by congressional intent. This mistaken assessment has had serious negative impacts on amici, and because of the continuing possibility for erroneous construction of national policy should the Ninth Circuit's position not be corrected, amici respectfully urge this Court to grant the writs of certiorari requested by petitioners.

DATED: March, 1986.

Respectfully submitted,

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